Supreme Court, U.S.
FILED

No. 97-1906 MAY 26 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

MELONIE WADE,

Petitioner,

vs.

VICTORIA COLLEGE,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Of The United States Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

JOHN GRIFFIN, JR.
State Bar No. 08460300
CYNTHIA T. SHEPPARD
Counsel of Record
State Bar No. 20245500
DREW B. TIPTON
State Bar No. 00791799

HOUSTON, MAREK & GRIFFIN, L.L.P.
120 Main Place, Suite 600
P. O. Box 2329
Victoria, Texas 77902
512-573-5500 [telephone]
512-573-5040 [facsimile]

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

52pp

QUESTIONS PRESENTED

I. The proper standard for holding an employer responsible for retaliation against an employee for reporting sexual harassment committed by a supervisory employee who uses his supervisory status to effectuate the retaliation.

II. What constitutes an adverse employment action in a retaliation case.

III. Whether questions of fact exist on the element of causation in this retaliation case.

LIST OF PARTIES

1. Petitioner Melonie Wade, 121 Hunters Circle, Victoria, Texas 77901.

2. Defendant Tom Walton, 309 Basswood, Victoria, Texas 77904.

3. Respondent Victoria College, 2200 E. Red River, Victoria, Texas 77901.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

I. The proper standard for holding an employer responsible for retaliation against an employee for reporting sexual harassment committed by a supervisory employee who uses this supervisory status to effectuate the retaliation i

II. What constitutes an adverse employment action in a retaliation case i

III. Whether questions of fact exist on the element of causation in this retaliation case i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

(i) Course of proceedings and disposition in the trial court 2

(ii) Statement of facts 3

ARGUMENT 7

1. Summary judgment standard of review 7

2. Respondent is responsible for the retaliation against an employee for reporting sexual harassment committed by a supervisory employee who used his supervisory status to effectuate the retaliation 7

TABLE OF CONTENTS – Continued

Page

3. Respondent is responsible for the supervisory employee's retaliation because it had actual knowledge of the retaliation and did nothing to stop it 11

4. The supervisory employee's interference with the employee's job constitutes an adverse employment action 11

5. Genuine issues of material fact exist on the issue of causation 16

CONCLUSION 17

PRAYER FOR RELIEF 18

APPENDIX:

(A) Opinion of the Fifth Circuit ..... App. 1

(B) Fifth Circuit order denying motion for rehearing ..... App. 5

(C) Opinion of the trial court ..... App. 6

TABLE OF AUTHORITIES

Page

CASES:

Arenson v. Southern University Law Ctr., 911 F.2d 1124 (5th Cir. 1990) 16

Armstrong v. City of Dallas, 997 F.2d 62 (5th Cir. 1993) 7

Barrow v. New Orleans S.S. Ass'n, 10 F.3d 292 (5th Cir. 1994) 8, 13, 14

Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S. Ct. 1461 (1986) 15

Bryant v. Hall, 238 F.2d 783 (5th Cir. 1956) 15

Cobb v. Anheuser Busch, 793 F. Supp. 1457 (E.D.Mo. 1990) 12

Cross v. Cleaver, No. 97-344 (8th Cir., April 10, 1998) 8, 10

Davis v. City of Sioux City, 115 F.3d 1365 (8th Cir. 1997) 16

Davis v. Palmer Dodge West, Inc., 977 F. Supp. 917 (S.D. Ind. 1977) 9

Davis v. State of Calif. Dept. of Corrections, 1996 WL 271001 (E.D.Cal. Feb. 23, 1996) 12

Dey v. Colt Construction and Development Co., 28 F.3d 1446 (7th Cir. 1994) 14

EEOC v. Bank of Ariz., 12 F.E.P. 527, 1976 WL 1727 (D. Ariz. 1976) 13

Gary v. Washington Area Transit Authority, 886 F. Supp. 78 (D.D.C. 1995) 8

TABLE OF AUTHORITIES – Continued

Page

Hyland v. Kenner Prod. Co., 13 F.E.P. 1309, 1976 WL 561 (S.D. Ohio 1976) 13

Jansen v. Packaging Corp. of Am., 123 F.3d 490 (7th Cir. 1997) *cert. granted in part, Burlington Industries, Inc. v. Ellerth*, ___ U.S. ___, 118 S. Ct. 876 (Jan. 23, 1998) (No. 97-569) 9

Jones v. Flagship Int'l, 793 F.2d 714 (5th Cir. 1986) 7

Karibian v. Columbia Univ., 14 F.3d 773 (2nd Cir.), *cert. denied*, 512 U.S. 1213 (1994) 9

Kim v. Nash Finch Co., 123 F.3d 1046 (8th Cir. 1997) ..9, 12

Landgraf v. USI Film Prods., 968 F.2d 427 (5th Cir. 1992), *aff'd*, 511 U.S. 244, 114 S. Ct. 2483 (1994) 12

Long v. Eastfield College, 88 F.3d 300 (5th Cir. 1996) 10

Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997) 12

Meritor Savings Bank v. Venson, 477 U.S. 57, 106 S. Ct. 2399 (1986) 13

Nunez v. Superior Oil Co., 572 F.2d 1119 (5th Cir. 1987) 15

Patrick v. LeFevre, 745 F.2d 153 (2d Cir. 1984) 7

Reed v. A.W. Lawrence & Co., Inc., 95 F.3d 1170 (2nd Cir. 1996) 9, 11

Shayer v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990) 10

Simien v. S.S. Kresge Co., 566 F.2d 551 (5th Cir. 1978) 15

Tanner v. Calif. Physicians' Serv., 27 F.E.P. 593, 1978 WL 210 (N.D.Cal. 1978) 13

TABLE OF AUTHORITIES – Continued

Page

Thomas v. Dillard Dep't Stores, No. 96-2966 (11th Cir. July 14, 1997) 16

Toscano v. Nimmo, 570 F. Supp. 1197 (D.Del. 1983) 13

Wade v. Walton, No. 97-40298 (5th Cir., Jan. 15, 1998) 1

Wade v. Walton, No. V-95-124 (S.D. Tex., Sept. 6, 1996) 1

West Americana, Inc. v. Aetna Cas. & Sur. Co., 915 F.2d 1181 (8th Cir. 1990) 15

STATUTES:

28 U.S.C. § 1254(a) 1

42 U.S.C. § 2000e-2(a) 2

42 U.S.C. § 2000e-3(a) 1, 2, 7

FED. R. CIV. P. 56(c) 7

OTHER:

EEOC Compliance Manual § 614.7 13

2 LARSON, EMPLOYMENT DISCRIMINATION § 34.04 (2d Ed. 1994) 13

LINDEMAN & KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW (1992) 13

Schwarzer, Hirsch & Barans, *The Analysis and Decision of Summary Judgment Motions*, 139 FRD 441 (1992) 15

OPINIONS AND ORDERS BELOW

The opinions of the Fifth Circuit and the district court are not reported. *See Wade v. Walton*, No. 97-40298 (5th Cir., Jan. 15, 1998); *Wade v. Walton*, No. V-95-124 (S.D. Tex., Sept. 6, 1996) *(reproduced at App. A & B).*

STATEMENT OF JURISDICTION

(i) The Fifth Circuit's order affirming the trial court was entered January 15, 1998.

(ii) The Fifth Circuit's order overruling Petitioner's Motion for Rehearing was entered on February 23, 1998.

(iii) Jurisdiction in this Court is conferred by 28 U.S.C. § 1254(a), as this is a petition for writ of certiorari to review a case from the court of appeals.

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3 (in pertinent part):

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§ 2000e-2000e-17], or because he has made a charge,

testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§ 2000e-2000e-17].

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition by the District Court and Fifth Circuit.

Melonie Wade filed suit in state court against the Victoria College alleging sexual harassment and retaliation for reporting the sexual harassment under Title VII of the Civil Rights Act. *See* 42 U.S.C. §§ 2000e-2(a); 2000e-3(a). Respondent removed the action to the United States District Court for the Southern District of Texas, Victoria Division, and moved for summary judgment with respect to all of Wade's claims. Wade responded to the dispositive motion and provided summary judgment evidence showing that she had been sexually harassed by her supervisor, Tom Walton and, in retaliation for reporting such behavior, had been constructively discharged.

The district court signed a memorandum opinion finding that Respondent was entitled to summary judgment with respect to all of Wade's claims *(App. C)*. Wade appealed from the trial court's judgment on her retaliation claim only. The Fifth Circuit affirmed, holding that there was no evidence of retaliatory intent on the part of the College, of Wade's constructive discharge, or of causation *(App. A)*.

(ii) Statement of Facts.

Melonie Wade was employed by the Victoria College in July of 1991 as the Articulation Coordinator for the newly-formed Tech Prep program, a federally funded, state-wide program. Wade's immediate supervisor was Tom Walton, who was responsible for technical education at the College and was originally in charge of the Tech Prep program. Walton reported to Dr. Steve Thomas, the Dean of Instruction.

Within days of beginning employment, Ms. Wade became the subject of inappropriate sexual comments and attention from Walton on an "unending", almost daily, basis. Walton invited Wade to get a hotel room with him on more than one occasion, and repeatedly referred to her to their fellow colleagues as his girlfriend. He told Wade that his marriage had been over for ten years and that he had always had girlfriends "on the side."

Walton also warned Wade that if anyone crossed him, he made a point to get even with them. Walton told Wade stories of getting rid of instructors, having grievance complaints "fixed" in his favor, and even of knowing "hit men."

Despite Walton's threats of retaliation and her own desire to be a team player, Wade finally confronted him about his behavior on February 25, 1992. Wade explained to Walton that his treatment of her had garnered her the reputation of a "bimbo" around the campus and had damaged her credibility with co-workers and others essential to her job performance.

In response, Walton immediately began a relentless campaign of retaliation which resulted in sabotaging Wade's ability to effectively perform her job. The very morning after Wade's confrontation, Walton for the first time reprimanded Wade concerning her job performance. Walton stood in Wade's office for an hour and a half questioning her about every issue in the Tech Prep program, about her authority and her judgment, and asked to see all of her files; something he had never done before the morning of February 25th. Before that time, Walton had never questioned Wade's job abilities and was of the documented opinion that she did an "excellent job."

Later that same day, Walton called Wade at home to say there was an urgent problem with one of the members of the Higher Education Coordinating Board, which governed the Tech Prep program. Wade later discovered there was no emergency at all, that Walton simply tried to scare Ms. Wade into believing the Board was mad at her.

On the second day after the confrontation, Walton informed Wade that she had alienated Victoria College, and that from now on she needed to inform him of all major happenings in Tech Prep prior to any action being taken. When Wade retreated from the confrontation in tears, Walton followed her to her office and cornered her behind her desk, screaming and pointing his finger at her as he leaned over her desk. When Ms. Wade responded that she just wanted to do her job, Walton stated, "we'll see about that" and left the room.

Unable to work in such an environment, Wade reported Walton's behavior to the President of Victoria

College, Dr. Jimmy Goodson. In response to her complaints, Goodson assured Wade that Walton would be "taken out of the loop," and told her to begin reporting to Dr. Thomas instead of Walton.

As it turned out, however, Walton was not taken out of the loop, and the retaliation continued, despite Wade's effort to stay away from him. Walton continued to be involved in the Tech Prep program because, according to Thomas, the College did not feel it could completely remove him from it due to his position as vocational director. Approximately one month after Walton was supposed to be taken "out of the loop," Thomas told Wade that she would have to continue working with Walton.

Walton arranged a meeting with Goodson to discuss the possibility of the College leaving the Tech Prep program, which would have eradicated Wade's job. The concerns that Walton voiced to Goodson about Wade's authority over Tech Prep had been at issue since February 6th, but Walton did not set up his meeting with Goodson until after Wade confronted him on February 25th. Wade was not getting information that she should have regarding the Tech Prep program, so that Thomas had to request that Walton send her the information. At times, the missing information would come to Wade's desk, days late, via Walton's secretary.

Walton cautioned the vocational instructors to be "very careful" around Wade, resulting in strained relations between her and the people who were vital to the success of Tech Prep. Walton also "warned" a member of the Tech Prep Board that he should "watch out" for "a mutual friend" (whom the board member assumed to be

Wade), and that if he wasn't careful, what he said around her could "get him in trouble."

Walton falsely reported to Goodson, that Ms. Wade had a "history" of filing sexual harassment complaints. Walton went behind Wade's back and gave her committee members "guidelines" the very day of an advisory committee meeting which Tech Prep had called. These guidelines led the College faculty to boycott the meeting and discredited the Tech Prep program that Ms. Wade had worked so hard to build up. Walton was ordered to apologize to the committee members for the walk-out.

As the year went on, both Thomas and Goodson were aware that the problems between Walton and Wade still persisted, but no further action was taken by either of them. Thomas assured Wade that he and Goodson were handling everything and that he would look into her complaints about Walton. However, when Wade continued to complain to Thomas about Walton's retaliation, he responded that he had to support his "staff," meaning Walton.

Wade was left with the choice of being subjected to retaliation or terminating her employment. As her efforts to do her job were increasingly frustrated by Walton's retaliatory actions, and her health began to deteriorate from the frustration and stress, Wade felt she had no choice but to resign. She submitted her resignation to the Board in January of 1993, citing the above reasons for her decision.

ARGUMENTS AND AUTHORITIES

1. Summary Judgment Standard of Review

The district court's grant of summary judgment is reviewed *de novo*. *See Armstrong v. City of Dallas*, 997 F.2d 62, 65 (5th Cir. 1993). Summary judgment is appropriate in cases only when there is no genuine issue as to any material fact, and the movant proves that it is entitled to judgment as a matter of law. *See* FED.R.CIV.P. 56(c).

Summary judgment is ordinarily inappropriate in the context of a work place discrimination case because the allegations usually require an explanation into an employer's true motivation and intent for making a particular employment decision. *Patrick v. LeFevre*, 745 F.2d 153, 159 (2d Cir. 1984).

2. Respondent is responsible for retaliation against an employee for reporting sexual harassment committed by a supervisory employee who used his supervisory status to effectuate the retaliation.

Title VII makes it illegal for an employer to discriminate against one of its employees because the employee has opposed an unlawful discrimination practice of the employer. *See* 42 U.S.C. § 2000e-3(a). In order to establish a prima facie case of retaliation, Wade was required to present evidence that (1) she engaged in activity protected under the anti-discrimination statute; (2) an adverse employment action occurred; and (3) there was a causal connection between the participation in the protected activity and the adverse employment action. *See Jones v. Flagship Int'l*, 793 F.2d 714, 719-20 (5th Cir. 1986).

In the case at hand, the Fifth Circuit finds there is no dispute that Wade engaged in protected activity when she reported Walton's sexual harassment to President Goodson. The court holds that there is, however, no evidence in this record that "*the College* harbored retaliatory intent or took any action calculated to encourage Wade's resignation," citing *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994) (Emphasis added). In other words, the Fifth Circuit holds that the retaliatory intent of Wade's supervisor, Tom Walton, is not imputed to the College. This holding is in error.

A split, or at least uncertainty, of authority exists among the Circuit Courts of Appeals on the proper standard to apply in holding an employer liable for the retaliatory conduct of supervisory employees. Some courts liken a retaliation claim to a "quid pro quo" sexual harassment claim in which an employer is vicariously liable for its employee's discrimination, reasoning that it is the supervisor's status that allows him to retaliate. *See Cross v. Cleaver*, No. 97-3441, slip op. at 29 (8th Cir., April 10, 1998) ("where a supervisory employee with the power to hire, fire, demote, transfer, suspend, or investigate an employee is shown to have used that authority to retaliate for the filing of a charge of sexual harassment, the plaintiff need not also prove that the employer participated in or knew or should have known of the retaliatory conduct to hold the employer liable"). *See also Gary v. Washington Area Transit Authority*, 886 F. Supp. 78, 88 (D.D.C. 1995) (holding that, "[i]n a retaliation case, as in a *quid pro quo* case, the employer should be held strictly liable").

Other courts have applied a "heightened negligence" standard to retaliation cases as in hostile environment sexual harassment cases, requiring the plaintiff to prove that the employer "knew or should have known" of the retaliatory conduct and taken steps to stop it. *See Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1180 (2nd Cir. 1996) (panel decision discussing the application of "agency" principles for employer liability for co-worker practices, including retaliation, applying a "knew but did nothing" standard); *Davis v. Palmer Dodge West, Inc.*, 977 F. Supp. 917, 925 (S.D. Ind. 1977) (holding it was "clear" in the Seventh Circuit that "courts must hold an employer to a heightened negligence standard for hostile environment and retaliatory harassment by a supervisor"). *See also, Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 494-95 (7th Cir. 1997), *cert. granted in part, Burlington Industries, Inc. v. Ellerth*, ___ U.S ___, 118 S. Ct. 876 (Jan. 23, 1998) (No. 97-569) (not clearly placing retaliation in either category).

Petitioner urges this Court to adopt the strict liability standard used in *quid pro quo* cases for the same reason this standard is applied in sexual harassment cases – because the *quid pro quo* harasser (here, the retaliator) by definition wields the employer's authority to alter the terms and conditions of employment -- either actually or apparently. *See Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2nd Cir.), *cert. denied*, 512 U.S. 1213 (1994).

Employment actions that are sufficiently adverse to sustain a retaliation claim are also often actions in which the retaliator wields the employer's authority to effect the retaliation, which must take the form of a material employment disadvantage. *See Kim v. Nash Finch Co.*, 123

F.3d 1046, 1060 (8th Cir. 1997) (sufficiently adverse actions include discharge, reduction of duties, *actions that disadvantage, or interfere with the employee's ability to do his or her job*, and "papering" of an employee's file with negative reports and reprimands) (Emphasis added).

It would follow that employer liability would also be imputed for such retaliatory acts because, in such circumstances, the retaliation is, by definition, acting as the employer. *Cross*, slip op. at 32.

Here, Walton had direct authority over Wade. The record supports the conclusion that Walton used his actual or apparent authority and acted within the scope of his duty to effect retaliation, rather than simply to harass Wade. Moreover, because Walton was a supervisory employee with the power to recommend hiring and firing, the College is liable for his actions under an agency theory. *See Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996); *Cross v. Cleaver*, No. 97-3441 (April 10, 1998). Because supervisory employees often have the authority to make the decisions to discipline, hire, and fire subordinates, a supervisory employee's decision to terminate will often be made in furtherance of the employer's business. *See Shayer v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). In such cases, the wrongful intent on the part of the supervisory employee is imputed to the employer.

3. Respondent is responsible for the supervisory employee's retaliation because it had actual knowledge of the retaliation and did nothing to stop it.

Even under a "heightened negligence" standard, Respondent is responsible for Tom Walton's retaliation in this case because it clearly had actual knowledge of his retaliatory conduct and did nothing to stop it. Wade reported Walton's retaliation and sexual harassment to the College's President, Jimmy Goodson. Although Goodson at first told Wade he would take Walton "out of the loop," one month later he reneged on that promise and told Wade she would have to continue reporting to Walton. The record clearly demonstrates that the College, through its President Jimmy Goodson and Dean Steven Thomas, knew about Walton's harassment and failed to take any reasonably calculated steps to stop it. They even ordered Walton to apologize to the Tech Prep board members for the walk-out he orchestrated. Under these circumstances, an employer is liable for failing to remedy a situation at which it had actual notice. *See Reed v. A.W. Lawrence & Co., Inc.*, 95 F.2d 1170, 1180 (2d Cir. 1996).

4. The supervisory employee's interference with the employee's job constitutes an adverse employment action.

An additional split of authority exists on the issue of what actions constitute an adverse employment action in a Title VII action. The Fifth Circuit apparently stands alone in holding that actions such as those involved here are not adverse employment actions. According to the

Fifth Circuit, Title VII covers only "ultimate employment decisions" such as hiring, firing, granting leave, discharging, promoting and compensating. *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). Under the Fifth Circuit's reasoning, an employer is free under Title VII to sabotage an employee's job, so long as it does not fire her or adversely affect her pay. This is in direct conflict with Circuit Courts holding that sufficiently adverse actions include reduction of duties, actions that disadvantage, or interfere with the employee's ability to do his or her job, and "papering" an employee's files with negative reports. *See Kim v. Nash Finch Co.*, 123 F.2d 1046, 1060 (8th Cir. 1997).

Petitioner urges this Court to adopt the latter view and to hold that she did raise a fact question regarding constructive discharge, or adverse employment action.[1] There is nothing in Title VII suggesting that hostile environment retaliation against an employee because she filed a charge alleging sexual discrimination should not be equally unlawful as retaliatory discrimination. Jurists and legal scholars who have specifically addressed the issue have reached the conclusion that retaliatory harassment of an employee may constitute retaliatory discrimination in violation of Title VII if the requisite elements are proven. *See, e.g., Davis v. State of Calif. Dept. of Corrections*, 1996 WL 271001 (E.D.Cal. Feb. 23, 1996); *Cobb v. Anheuser Busch*, 793 F. Supp. 1457, 1491 (E.D.Mo. 1990); *Toscano v.*

---

[1] The Fifth Circuit equates no constructive discharge with no adverse employment action. *See Landgraf v. USI Film Prods.*, 968 F.2d 427 (5th Cir. 1992), *aff'd*, 511 U.S. 244, 114 S.Ct. 2483 (1994).

Nimmo, 570 F. Supp. 1197, 1204-06 (D.Del. 1983); *Tanner v. Calif. Physicians' Serv.*, 27 F.E.P. 593, 1978 WL 210 (N.D.Cal. 1978); *EEOC v. Bank of Ariz.*, 12 F.E.P. 527, 1976 WL 1727 (D. Ariz. 1976); *Hyland v. Kenner Prod. Co.*, 13 F.E.P. 1309, 1976 WL 561 (S.D. Ohio 1976); LINDEMAN & KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW at 282 (1992); 2 LARSON, EMPLOYMENT DISCRIMINATION § 34.04 at 34-57-34-62 (2d Ed. 1994).

The EEOC's administrative interpretations indicate that the employer can be held responsible under Title VII's retaliation section for failing to remedy or prevent co-worker or customer retaliation against a Title VII's sexual harassment claimant if the retaliation subjectively and objectively creates severe or pervasive hostility in the claimant-employee's working environment. *See EEOC Compliance Manual* § 614.7.

In a retaliation hostile environmental claim, Respondent is required to prove that the harassment was sufficiently severe or pervasive as to alter the conditions of her work environment, that the College knew or should have know of the harassment and failed to take steps reasonably calculated to end the abuse. *See Meritor Savings Bank v. Venson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404-05 (1986).

To make a prima facie case that she was constructively discharged, Wade is required to show some evidence that her employer made her working conditions so intolerable that a reasonable person in her shoes would have felt compelled to resign. *See Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994). The determination of whether an employee has been constructively discharged depends on the facts of each case. *Id.* One of

the relevant factors in making this determination is *badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation. Id.* (Emphasis added).

Wade's evidence shows that, beginning the very day after she first confronted him about his sexual harassment, Walton made good on his practice and implied threat of getting even by sabotaging and undermining her work. For the first time, Walton questioned Wade's authority and judgment on every Tech Prep issue and berated her for sending out a letter that he had previously approved. Later the same day, he concocted an emergency designed to panic Wade. The very next day, he screamed and yelled at her to the point that she was afraid he would attack her physically, and ended the confrontation by threatening that he would make sure she could not do her job anymore. Walton caused the walk-out of a Tech Prep advisory committee *and was later ordered by the College to apologize.* Walton kept Wade from getting the information she was supposed to get regarding the program; he warned their colleagues about her and falsely reported to the College's President that she had a history of making sexual harassment complaints. He talked to Goodson about eliminating the Tech Prep program altogether, and warned their colleagues about her, causing them to be distant and distrustful.

This type of working environment is the very essence of constructive discharge and a retaliatory hostile environment. The evidence shows that Walton's adverse actions occurred "on the heel of the protected expression." *See Dey v. Colt Construction and Devel. Co.*, 28 F.3d 1446 (7th Cir. 1994). Walton continually undermined

Wade's ability to do her job, tried to sabotage the program upon which her job relied at every opportunity, and disparaged her to her colleagues. It shows a calculated effort to pressure her into resignation through the imposition of unreasonable harsh conditions, in excess of that faced by her co-workers. *See Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S. Ct. 1461 (1986). It is also sufficient to show Petitioner suffered an adverse employment action.

The question of whether a person's actions are reasonable under the particular circumstances is predominantly a factual issue that is more appropriately decided by a jury. *See* Schwarzer, Hirsch & Barans, *The Analysis and Decision of Summary Judgment Motions*, 139 FRD 441 (1992). Reasonableness is an ultimate fact for a jury to determine that cannot be resolved on summary judgment. *See Bryant v. Hall*, 238 F.2d 783, 787 (5th Cir. 1956); *Simien v. S.S. Kresge Co.*, 566 F.2d 551 (5th Cir. 1978); *West Americana, Inc. v. Aetna Cas. & Sur. Co.*, 915 F.2d 1181, 1184 (8th Cir. 1990). Where the inference to be drawn from summary judgment evidence requires "experience with mainsprings of human conduct" and "reference to the data of practical human experience," as here, the jury must make the determination; summary judgment is improper. *See Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1126 (5th Cir. 1987).

It is clear that the sum of Walton's conduct creates an issue of fact as to whether Wade was constructively discharged or suffered an adverse employment action. The Fifth Circuit has repeatedly pointed out that the burden of establishing a *prima facie* case is "not onerous." *See*

Arenson v. Southern University Law Ctr., 911 F.2d 1124, 1127 (5th Cir. 1990).

5. Genuine issues of material fact exist on the issue of causation.

Finally, the Fifth Circuit concludes that there is no evidence of causation between Wade's report of Walton's sexual harassment and his retaliatory actions in her constructive discharge. This holding belies the record.

The very day after Wade confronted Walton about his sexual harassment, Wade made good on his threat of getting even by sabotaging and undermining her work. Although the College presented evidence of nondiscriminatory reasons for Walton's actions, Wade nevertheless presented sufficient evidence to raise a fact question on the issue of causation. Before their confrontation over the sexual harassment, Walton had never before criticized Wade's work, and in fact had described her as an "excellent" employee. He had never before questioned the continuing viability of the Tech Prep program, even though the issues he raised had been brought to his attention months earlier. The College at first agreed to take Walton out of the loop, but later reneged, finally telling Wade that they would have to stand behind Walton. Although Wade was promoted during this period of time, this did not change the fact that she was unable to do her job due to Walton's retaliation. *See, e.g., Davis v. City of Sioux City*, 115 F.3d 1365 (8th Cir. 1997) (allegedly retaliatory job transfer, even to better paying job, declared adverse action under Title VII); *Thomas v. Dillard Dep't Stores*, No. 96-2966 (11th Cir. July 14, 1997) (offer of

alternative position does not preclude inquiry into whether plaintiff was actually terminated). It is clear, then, that the record establishes a fact question regarding a causal connection between Wade's report of Walton's sexual harassment and his, and thus the College's, adverse employment actions against her.

CONCLUSION

This court should, for the good of the practicing bar, the lower courts, and the public, clarify the standard to be used in holding employers responsible for the retaliation of its supervisory employees as well as the law regarding adverse employment action in Title VII cases.

PRAYER FOR RELIEF

WHEREFORE, Petitioner Melonie Wade respectfully requests that the petition be granted and that upon submission to this Court that the judgment of the trial court be reversed and remanded for trial.

Respectfully submitted,

JOHN GRIFFIN, JR.
State Bar No. 08460300
CYNTHIA T. SHEPPARD
Counsel of Record
State Bar No. 20245500
DREW B. TIPTON
State Bar No. 00791799

HOUSTON, MAREK & GRIFFIN, L.L.P.
120 Main Place, Suite 600
P. O. Box 2329
Victoria, Texas 77902
512-573-5500 [telephone]
512-573-5040 [facsimile]

Attorneys For Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-40298

MELONIE WADE,

Plaintiff-Appellant,

VERSUS

TOM WALTON; VICTORIA COLLEGE,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(V-95-124)

(Filed Jan. 15, 1998)

Before WISDOM, HIGGINBOTHAM, and STEWART, Circuit Judges. PER CURIAM:*

Melonie Wade appeals the summary judgment entered for Defendant-Appellee Victoria College on her retaliation claim brought under Title VII of the Civil Rights Act of 1964. We affirm.

---

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Wade was employed by the College in July 1991 as the Articulation Coordinator for the newly-formed Tech Prep program, a federally funded, state-wide program. Wade's immediate supervisor was Tom Walton, who was responsible for technical education at the College and was originally in charge of the Tech Prep program. Walton reported to Dr. Steve Thomas, the Dean of Instruction.

Walton made remarks to Wade with implied sexual connotations beginning just days after Wade's employment began. On February 25, 1992, Wade confronted Walton about his inappropriate comments for the first time and informed him that they were offensive and unwelcome. The next morning, Walton reprimanded Wade concerning her job performance for the first time. Over the next two days they had a series of heated discussions that culminated, on February 27, 1992, in Walton screaming and pointing his finger at Wade and Wade retreating in tears. Wade characterizes the February disputes as retaliation for her allegations of sexual harassment, but the College contends that the disputes centered on their differing views about their respective authority over policy and budget in the Tech Prep program. On February 28, 1992, Wade complained about Walton's inappropriate sexual comments to Dr. Jimmy Goodson, the President of the College. In response to Wade's complaint, President Goodson removed Walton as Wade's supervisor, arranged for Wade to report directly to Thomas, and directed Wade and Walton to communicate in writing only. Wade was also promoted to Tech Prep Coordinator and given a raise. Wade and Walton were never again alone together.

In spite of the College's remedial action and the absence of any further direct contact between Wade and Walton, Wade alleges that Walton continued to retaliate against her and that the College either failed to respond appropriately or affirmatively participated in the retaliation. In a letter dated December 11, 1992, she resigned from her position, citing sexual harassment and program sabotage as the motivating factors.

Wade filed suit in state court against the College alleging sexual harassment, retaliation, wrongful termination and breach of contract. The case was removed to federal court. The district court granted summary judgment for defendants with respect to all of Wade's claims.

This court reviews the district court's grant of summary judgment *de novo*. *Armstrong v. City of Dallas*, 997 F.2d 62, 65 (5th Cir. 1993). Summary judgment is appropriate when there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

To establish a prima facie case of retaliation, Wade was required to present admissible evidence that (1) she engaged in activity protected under the anti-discrimination statute; (2) an adverse employment action occurred; and (3) there was a causal connection between the participation in protected activity and the adverse employment action. *Jones v. Flagship Int'l*, 793 F.2d 714, 719-20 (5th Cir. 1986).

There is no dispute that Wade engaged in activity protected by the anti-discrimination statute when she reported Walton's sexual harassment to President Goodson. As to the second and third elements, Wade contends

that the adverse employment action she suffered should be treated as a constructive discharge. To succeed on this claim, Wade must show that the working conditions she faced were so intolerable that a reasonable person in her shoes would have felt compelled to resign. *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 242 (5th Cir. 1993). Wade must also establish that the actions that led to her decision to quit were tainted by unlawful animus. *See Bozé v. Branstetter*, 912 F.2d 801, 806 (5th Cir. 1990).

There is no evidence in this record that the College harbored retaliatory intent or took any action calculated to encourage Wade's resignation. *See Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994). Although Wade and Walton had an unpleasant working relationship after she reported the sexual harassment, the summary judgment evidence does not raise a material question of fact on Wade's claim of constructive discharge or on the element of causal connection.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40298

MELONIE WADE

Plaintiff-Appellant

v.

TOM WALTON; VICTORIA COLLEGE

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas, Victoria

ON PETITION FOR REHEARING

(Filed Feb. 23, 1998)

Before WISDOM, HIGGINBOTHAM and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ John Minor Wisdom
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS VICTORIA DIVISION

MELONIE WADE,	§	
Plaintiff,	§	
	§	
v.	§	C.A. NO. V-95-124
TOM WALTON AND THE VICTORIA COLLEGE,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION
(Filed Sep. 9, 1996)

Melonie Wade ("Wade") filed this suit in state court, alleging assault and slander against Tom Walton ("Walton"), and alleging sexual harassment, retaliation, wrongful termination, and breach of contract against the Victoria College ("the College"). Defendants removed the action to this Court. Defendants have filed three dispositive motions. After considering the entire record and the applicable law, the Court will GRANT Defendants' motion for summary judgment (Dkt. #13), rendering MOOT Defendants' motion to strike (Dkt. #3) and Defendants' motion to dismiss (Dkt. #4).

Factual Summary

The College participates in a federally funded, statewide program called "Tech-Prep." The College distributed federal grant money that funded the program. Walton was responsible for technical education at the

College and originally was in charge of the Tech-Prep program. Walton reported to Dr. Steve Thomas ("Dr. Thomas"), Dean of Instruction at the College.

The College hired Wade in July of 1991. She worked at the College until she resigned in January of 1993. The College hired Wade to be Tech-Prep's "Articulation Coordinator." Her duties included writing an implementation grant for the program. Walton originally supervised Wade.

From the time Wade started working at the College until February 25, 1992, Wade alleges that Walton subjected her to many comments, including the following:

* In July of 1991, Walton introduced Wade to her new co-workers, describing her as his new girlfriend;

* In August of 1991 and February of 1992, Wade offered to help Walton do his work. Walton retorted that she should "never ask a man that";

* During a meeting with Dr. Terry Walsh, Plaintiff, and Walton in January of 1992, Walton said that Plaintiff "doesn't show enough leg to pull."

* In January of 1992, Walton told Wade to "hike her dress up" while the two were climbing a flight of stairs;

* In January of 1992, Plaintiff rode in Walton's car to Austin on a business trip. While driving, Walton rolled up the windows, locked the doors, and asked Plaintiff what the definition of sexual harassment was;

* On February 25, 1992, Walton told Wade that good looking women were lucky because their looks could open doors with the "good old boy network";

* Walton once described an instructor from another college who "had a student bent over his desk, loaded like a shotgun";

* In discussing his marital problems with Wade, Walton commented that he had "always had girlfriends";

* Walton told other instructors at the College about a (true) incident when Wade came to her front door with no clothes on when he brought her a cup of coffee; and

* One night after Wade and Walton worked late to complete a grant application that had to be delivered to Austin the next day, Walton suggested they drive to Austin and get a hotel room.

Walton's coarse language understandably offended Wade. On February 25, 1992, Wade confronted Walton, for the first time, and told him that his comments were inappropriate.[1] Walton apologized, and after this discussion, Walton never again showered Wade with his disparaging remarks.

Wade's confrontation, however, did not end her difficulties. The next day, February 26, 1992, Walton and Wade quarreled over various facets of the Tech-Prep program. Walton challenged Wade's program issues, questioned her judgment and authority and wanted to see all of her files. Walton complained about Wade creating a Tech-Prep board of directors without his ideas. Walton and Wade had another confrontation on February 27, 1992. Walton accused Wade of alienating the college. She told

---

[1] Prior to this confrontation, Wade avoided Walton's remarks by abruptly changing the subject. Wade did not confront Walton and his lewd behavior until February. Wade depo. 176: 22 to 177: 2; 211: 15-18.

him that she wanted to do her job, to which Walton retorted: "We'll see about that."

Apparently fed up with Walton's juvenile conduct, Wade approached the College's president, Dr. Jimmy Goodson ("Dr. Goodson") on February 28, 1992. This was the first time Wade recalled reporting Walton's conduct to one of his superiors.[2] Wade told Dr. Goodson that Walton had made inappropriate comments to her. In response, Goodson told Wade to report to Dr. Thomas, the College's Dean of Instruction. Goodson changed Wade's reporting procedures: he removed Walton's supervisory authority over Wade and required all communications between the two to be in writing. Goodson also required Walton to avoid one-on-one contact with Wade. These measures prevented Walton from lobbing his offensive remarks at Wade, although he remained involved in the Tech-Prep program.[3]

Although Wade and Walton avoided face-to-face confrontations, Walton apparently worked behind the scene to frustrate Wade's work. According to Wade, Walton engaged in the following conduct after he lost authority over Wade:

* Walton met with Dr. Goodson on February 27, 1992, to discuss the possibility of the College leaving the Tech-Prep program, thereby canceling Wade's position. Wade was not present for the meeting. Although the

---

[2] *See* Wade depo, at 124.

[3] Walton contacted Wade by telephone three times to discuss budget issues with her, but Wade does not complain about these contacts, which were made while Wade was absent with an extended illness.

parties dispute when and why Walton requested the meeting, it is undisputed that the College remained in the Tech-Prep program until after Wade resigned;

* Wade claims she was not receiving information and other resources from Walton's office. The record cited by Wade suggests that she did not receive a Technical Assistance Guide she should have received, and had to ask Walton's office for one. Walton apparently complied with the request. She also claims Walton intercepted her faxes, but she presents no witness with personal knowledge of such facts;[4]

* Walton gave four College instructors some material on sexual harassment and told them they had to watch what they said around Wade. Apparently, two of the instructors' spouses also warned them not to fraternize with her;

* Walton wrote a memorandum to Dr. Thomas, stating that Wade had a history of accusing persons of sexual harassment. Walton later admitted (during this deposition) that the memo was based on second-hand information;

* Walton apparently told a third party, one Carol Heinrichs, that Wade had once been involved in a drunken brawl. Wade does not provide any testimony from Heinrichs. At any rate, Wade admits that a drunk person once struck her, an incident that landed several people in jail;[5]

* Finally, Wade claims Walton "sabotaged" a Prep-Tech advisory committee by issuing guidelines for the committee. Wade was not present for this meeting, which

---

[4] Wade admits that she "assumes" Walton intercepted her faxes. Wade depo., 221.

[5] Wade depo., 590.

occurred on November 18, 1992, but claims the guidelines resulted in a boycott. The undisputed testimony of Walton and Dr. Thomas paints a different picture: two instructors walked out of the meeting because of concerns the committee lacked a quorum to conduct business. Wade presents no testimony of the "boycotting" faculty members to support her assertions that Walton orchestrated a walk out.

Wade went to Dr. Thomas and complained about Walton's conduct. Dr. Thomas assured Wade that "they were handling it." Dr. Thomas also responded that he "had to support his staff." Wade claims this statement was Thomas's way of supporting Walton (as opposed to Wade, whom Thomas supervised) and was evidence of retaliation by Thomas.

It is undisputed that the College and its employees never disciplined or reprimanded Wade during her time at the College. To the contrary, after Wade discussed her problems with Dr. Goodson, the College promoted her to Tech-Prep Coordinator and gave her a raise.

Wade resigned in December of 1992, effective in January of 1993. Plaintiff filed her charge of discrimination with the Texas Commission on Human Rights on April 11, 1993.

Analysis

Wade's Hostile Work Environment Claim

To establish a claim of sexual harassment in the workplace, a plaintiff must demonstrate "(1) [t]hat she belongs to the protected class; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment

was based on sex; (4) that the harassment affected a 'term, condition or privilege of employment,'; and (5) that the employer either knew or should have known of the harassment and failed to take prompt remedial action." *DeAngelis v. El Paso Mun. Officers Ass'n*, 51 F.3d 591, 593 (5th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 473 (1995) (quoting *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 403 (5th Cir. 1993)). Sexual harassment may be grounded on two theories under Title VII: quid pro quo discrimination and hostile work environment. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404-2405 (1986). Wade accuses the College of subjecting her to a hostile work environment.

A hostile work environment exists when an employer's conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment." *Meritor Sav. Bank*, 477 U.S. at 65, 106 S. Ct. at 2404-2405. To prove the existence of a hostile work environment, Wade must prove that she was subjected to: (1) sexually discriminatory intimidation, ridicule and insults, which were (2) sufficiently severe or pervasive that they (3) altered the conditions of her employment and (4) created an abusive working environment. *DeAngelis*, 51 F.3d at 594 (citing *Harris v. Forklift Systems, Inc.*, 501 U.S. 17, ___, 114 S. Ct. 367, 370 (1993)). To decide whether a working environment is 'hostile' or 'abusive', all the circumstances must be considered including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*,

501 U.S. at ___, 114 S. Ct. at 371. "The test is an objective one, *not* a standard of offense to a 'reasonable woman.' " *DeAngelis*, 51 F.3d at 594 (citing *Harris*, 501 U.S. at ___, 114 S. Ct. at 370). Recently, the Fifth Circuit described the difficulty of proving a hostile work environment claim:

> A hostile environment claim embodies a series of criteria that express extremely insensitive conduct against women, conduct so egregious as to alter the conditions of employment and destroy their equal opportunity in the workplace. Any lesser standard of liability, couched in terms of conduct that sporadically wounds or offends but does not hinder a female employee's performance, would not serve the goal of equality. In fact, a less onerous standard of liability would attempt to insulate women from everyday insults as if they remained models of Victorian reticence.

DeAngelis, 51 F.3d at 593, *See also Baskerville v. Culligan Intern. Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (Title VII "is not designed to purge the workplace of vulgarity."). Thus, a hostile work environment claim may not be grounded on the occasional insult. To hold otherwise would create a gender-based preference, rather than enforcing equality in the workplace. *DeAngelis*, 51 F.3d at 593. *See Harris*, 501 U.S. at ___, 114 S. Ct. at 370 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview.").

Under the circumstances of this case, the Court believes Wade has not presented genuine issues of material fact as to her hostile work environment claim. First,

Walton's actions were not sufficiently severe or pervasive to have created a hostile work environment. Many of Walton's comments were reprehensible; they reveal "the impression of a man whose sense of humor took final shape in adolescence." *Baskerville*, 50 F.3d at 431. The Court does not condone such statements. Nevertheless, Walton's comments were only occasional and not the type of coercive or aggressive conduct that have failed to survive summary judgment in other cases. *See Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309 (5th Cir. 1987) (coworker's conduct during business trip, including placing his hands on plaintiff's hips and dropping his pants while waiting to board airplane, touching plaintiff's breasts, and asking plaintiff and others "to get naked and go to [coworker's] room" revealed "disgusting lack of professionalism" but was not sufficiently "aggressive or coercive" to create hostile working environment); *Jones v. Flagship Intern.*, 793 F.2d 714, 720 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065, 107 S.Ct. 952 (1987) (supervisor who propositioned employee on three separate occasions while on business trips did not prove hostile working environment claim); *Gearhart v. Eye Care Ctrs.*, 888 F. Supp. 814, 823 (S.D. Tex. 1995) (Crone, J.) (many innuendo and sexual remarks made by two co-workers, and three instances of offensive touching, over six weeks, is insufficient evidence).

Second, besides the College's decision to move Walton into a less threatening position, there is no evidence that the isolated events Wade faced had any effect upon

her ability to work for the College.[6] *See DeAngelis*, 51 F.3d at 596 (noting weak impact upon workplace of allegedly hostile remarks). The conduct Wade faced was not so severe and pervasive that it destroyed her ability to succeed in the workplace. *See Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 194 (5th Cir. 1996).

Finally, the College's response to Wade's complaints was prompt and decisive. An employer becomes liable for sexual harassment only if it knew or should have known of the harassment and failed to take prompt remedial action. *Garcia v. Elf Atochem, N.A.*, 28 F.3d 446, 451 (5th Cir. 1994). When an employer receives notice of alleged sexual harassment and makes a prompt remedial response to the complaint that is reasonably calculated to end the harassment, the employer is not liable for the sexual harassment, even if the conduct complained of in fact occurred. *See Carmon v. Lubrizol Corp.*, 17 F.3d 791, 794-95 (5th Cir. 1994); *accord Weller*, 84 F.3d at 195 n.7. What constitutes an appropriate remedial action "will necessarily depend on the particular facts of the case – the severity and persistence of the harassment, and the effectiveness of any initial remedial steps." *Garcia*, 28 F.3d at 451. In this case, Wade told the College that Walton had subjected her to insulting remarks. The College's prompt response to this complaint was successful: since the College changed Wade and Walton's working relationship, Wade never had to endure another sexually derisive remark from Walton or any other employee. *See Garcia*, 28 F.3d at 451 ("Garcia's argument is unpersuasive because

---

[6] As the Court discussed earlier, Wade does not connect the purported "boycott" to Walton.

not only were [the plant manager's] actions prompt and reasonably calculated to end the harassment, but the harassment actually ended."). The Court cannot conclude that the College's decision to shift Walton out of a position of authority over Wade could be anything but a reasonable response by an employer. *See Nash*, 9 F.3d at 403-404.

Wade's Retaliation Claim Against the College[7]

"Retaliation under Title VII is an action taken against an employee by an employer because of the employee's opposition to discriminatory practices." *Humphreys v. Medical Towers, Ltd.*, 893 F. Supp. 672, 686 (S.D. Tex. 1995) (Crone, J.) (citing *De Anda v. St. Joseph Hosp.*, 671 F.2d 850, 852 n.1 (5th Cir. 1982)). To prove her retaliation claim, Wade must establish a prima facie case of retaliation by a preponderance of the evidence. The prima facie case, if established, raises a presumption of discrimination that the defendant must rebut by articulating a legitimate, nondiscriminatory reason for its actions. If the defendant satisfies this burden, the presumption disappears, and the

---

[7] The parties have expended a great deal of energy debating whether Wade can proceed on a 'unified' set of facts, or whether these facts must be divided into her various claims. The Court will not ignore common sense. Walton first attempted to interfere in Wade's work after she had complained about Walton's crude conduct. At that point, Walton's words ended and his vindictive actions allegedly began. The only conclusion the Court reaches from this chronology is that Walton's efforts to undermine Wade was *retaliation* because she reported his questionable conduct, not *discrimination* because of her gender.

plaintiff "must prove that the legitimate reason articulated by the defendant was false and that the defendant's real reason for discharging the plaintiff was discriminatory or otherwise prohibited by Title VII." *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 507 (5th Cir. 1994). The plaintiff retains the ultimate burden of persuasion throughout the case. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, ___, 113 S. Ct. 2742, 2747 (1993).[8]

Wade will satisfy her prima facie burden if she can present material facts which show that (1) she engaged in activity protected by Title VII; (2) an adverse employment action occurred to her following the protected activity; and (3) there was a causal connection between the participation in the protected activity and the adverse employment action. *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 507 (5th Cir. 1994) (Title VII, interpreting *McDonell Douglas); Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 298 (5th Cir. 1994) (same); *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 (5th Cir. 1992) (same).

To satisfy the second prong of her prima facie case, Wade claims the College constructively discharged her. This difficult standard requires Wade to show that the working conditions she faced were so intolerable that a reasonable person in her shoes would have felt compelled to resign. *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 242 (5th Cir. 1990). "To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to

---

[8] Wade presents no *direct* evidence of retaliation by the College. Therefore, the Court must use the burden shifting method described by *Nowlin*.

prove a hostile working environment." *Landgraf v. USI Film Prod.*, 968 F.2d 427, 430 (5th Cir. 1992) *aff'd*, 511 U.S. 244, 114 S. Ct. 1483 (1994); *accord Weller*, 84 F.3d at 195 n.7. Some humiliation and embarrassment is not enough to support a theory of constructive discharge, and the claim cannot be based upon the employee's subjective preference for one position over another. *Jett v. Dallas Indep. Sch. Dist.*, 798 F.2d 748, 755-56, *modified on other grounds*, 491 U.S. 701, 109 S. Ct. 2702 (1989).

The College's conduct toward Wade did not amount to the "harbinger of [Wade's] dismissal." *See McCann v. Litton Sys., Inc.*, 986 F.2d 946, 952-53 (5th Cir. 1993); *Junior v. Texaco, Inc.*, 688 F.2d 37, 380 (5th Cir. 1982). To the contrary, the College's actions were supportive. Wade received an increase in pay and received a promotion to Tech-Prep Coordinator soon after making her complaints. It is undisputed that the College never reprimanded her, demoted her, or demeaned her.

Even assuming Walton's actions could be attributable to the College,Wade's claim of retaliation would still fail. First, Wade bases her retaliation claim mostly on speculation, inadmissible hearsay, or unhelpful facts.[9] She does

---

[9] The Federal Rules of Civil Procedure require affidavits produced in opposition to a motion for summary judgment to "be made on personal knowledge [and to] set forth such facts as would be admissible in evidence." FED. R. CIV. P. 56(e). The requirement that affidavit testimony be admissible applies "with equal force" to deposition testimony. *Samuels v. Doctors Hospital, Inc.*, 588 F.2d 485, 486 (5th Cir. 1979). Thus, "evidence inadmissible at trial cannot be used to avoid summary judgment." *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992); *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 191 (5th Cir. 1991).

not have personal knowledge of the supposed "boycott" of her advisory committee meeting, nor does she provide the Court with evidence of persons who were aware of the facts underlying the walkout.[10] She "assumes" that Walton commandeered her faxes. She claims Walton spread rumors about her, but she presents no evidence of this besides the vague affidavit of Neill Amsler.[11] Further, the alleged rumors are based on fact: Wade was punched by a drunk person, and she did answer her hotel room door while not fully clothed.

Second, Walton was not in a position of authority to alter the terms and conditions of her employment after February 28, 1992. Even if he were, he never threatened Wade with termination. The Fifth Circuit has held that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995) (per curiam). Walton's

---

To determine whether summary judgment evidence is admissible, the Court should use "the same rules that govern the admissibility of evidence at trial." *Lavespere v. Niagra Machine & Tool Works, Inc.*, 910 F.2d 167, 176 (5th Cir. 1990) (citations omitted), *cert. denied*, 510 U.S. 859, 114 S. Ct. 171 (1993).

[10] Defendants' unchallenged evidence, on the other hand, reveals that the purported walk-out was confusion regarding whether the committee had a quorum to make decisions.

[11] The affidavit states that "Tom Walton came to me and told me that a mutual friend of ours, who's name will remain unspoken, has some problems. He said that I need to be careful what I said around that friend or that I could get in trouble. I assumed he was talking about Melonie [Wade]."

actions were, at best, decisions that had tangential effects upon Wade's decision to leave.

Finally, the circumstances of her resignation calls Wade's retaliation theory into question. Wade went to Dr. Goodson, the president of the College, to complain about Walton's conduct.[12] Although she faced problems with Walton after the College took steps to separate them, Wade never again returned to Dr. Goodson to seek relief. Wade did not attempt to attack her employment problems from within her existing employment relationship. *See Bozé v. Branstetter*, 912 F.2d 801, 805 (5th Cir. 1990) ("employees who oppose unlawful discrimination best serve the policies underlying Title VII, which accords them legal protection, if they attack that discrimination 'within the context of existing employment relationships.' "). Instead, the record suggests that Wade resigned in her frustration over the Tech-Prep program (and Walton's possible involvement in it), many months after the two had their confrontation. The Court appreciates that Wade's position may have been stressful. However, Title VII does not guarantee a stress free work environment:

> Every job has its frustrations, challenges and disappointments; these inhere in the nature of work. An employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his co-

---

[12] Although Wade expressed some uncertainty about the person to whom she should bring her complaints, the parties appear to agree that the College's grievance policy provided for relief by bringing complaints to Dr. Goodson.

> workers. He is not, however, guaranteed a working environment free of stress.

Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S. Ct. 1461 (1986); *accord Patton v. United Parcel Serv., Inc.*, 910 F. Supp. 1250, 1265 (S.D. Tex. 1995) (Crone, J.).

Wade's Contract Claims

Wade also claims that the College breached its employment contract with her. Wade claims to be the beneficiary of a five-year employment contract.[13] Wade bases her five-year term on the College's oral representations that she would have her job as long as funding existed and while her job performance was satisfactory.

This agreement is barred by the Statute of Frauds. The statute, TEX. BUS. & COMM. CODE § 26.01, provides that "an agreement which is not to be performed within one year from the date of making the agreement" is not enforceable unless the agreement is in writing and signed by the person to be charged with the agreement. Wade claims her contract falls outside the statute because performance would have been possible within one year: if funding for the Tech-Prep program ceased within one year, so would her job. This argument must fail, for an employee agreement for a term of five years is not performable within one year merely because a contingency causes the contract to end. *See Collins v. Allied Pharmacy Mgt., Inc.*, 871 S.W. 2d 929, 934 (Tex. App. – Houston 1994, no writ) (citing *Gilliam v. Kouchoucos*, 340 S.W. 2d 27, 30

---

[13] Dkt. #19, at 23.

(Tex. 1960)). For Wade's agreement to fall outside the statute of frauds, there also must be a "written memorandum which is complete in itself in every detail and which contains all of the essential elements of the agreement, so that the contract can be ascertained from the writing without resort to oral testimony." *Collins*, 871 S.W. 2d at 933 (quoting *Cohen v. McCutchin*, 565 S.W. 2d 230, 232 (Tex. 1978)). Wade produces no document that satisfies this standard.

Even assuming a contract existed, the Court has already held that the College did not constructively discharge Wade and did not violate Title VII. Therefore, the College did not breach any agreement with her.

Wade's Slander Claims

Wade also accuses Walton of slander. Specifically, Wade claims Walton told (1) third parties that Wade answered her front door with no clothes on; (2) third parties that Wade once was involved in a drunken brawl, and (3) Neill Amsler that a "mutual friend" had some problems, and that he should watch out or the friend could get him into trouble.

Actionable slander is a defamatory statement that is orally communicated or published with no legal excuse. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995); *Cain v. Hearst Corp.*, 878 S.W. 2d 577, 580 (Tex. 1994); *Galveston County Fair & Rodeo, Inc. v. Glover*, 880 S.W.2d 112, 119 (Tex. App. – Texarkana 1994, no writ). "The elements [of slander] are 1) an oral statement; 2) which is false; 3) which is published to a third person; and 4) which refers to an ascertainable person." *Reeves v.*

Western Co. of North America, 867 S.W. 2d 385, 393 (Tex. App. – 1993, writ denied).

Wade admits that the first two comments were based on fact: (1) Wade did answer her hotel room door at 6:30 A.M. while not fully dressed, and (2) Wade admits that a drunk person once struck her, an incident that landed several people in jail.[14] Walton's remark to Amsler is vague: it does not identify Wade directly. *Glover*, 880 S.W. 2d at 119 ("plaintiffs in a libel or slander action must be the particular persons about whom the allegedly defamatory statements are made, which normally means the plaintiffs must be named."). *See* TEX. CIV. PRAC. & REM. CODE § 73.001 (1986). Further, the statement was a warning grounded on Walton's actual experience with Wade. Amsler's affidavit does not describe Walton's comment as being made with threatening overtones, except to warn Amsler not to use rough language around Wade. Therefore, none of these comments are slanderous.

Finally, Defendants argue that Wade only relies upon hearsay testimony to support her claim that Walton made these comments. Wade admits that she never heard the comments Walton made to third parties.[15] The only competent summary judgment evidence Wade provides the Court is Amsler's affidavit. Besides Amsler's comment, Wade's slander claims are not supported by competent summary judgment evidence.

---

[14] Wade depo. 127, 633-34, 635.

[15] *See* Dkt. #19, at 28.

Assault

Finally, Wade's claim of assault must fail. Wade claims Walton assaulted her when he (1) locked the car doors while driving down the road and asked Wade for the definition of sexual harassment, and (2) followed Wade back to her office during the February 27, 1992 confrontation, shouted at Wade in a loud voice, and shook his finger at her while she and he were separated by a desk.[16]

A person commits assault in Texas if he intentionally threatens another with imminent bodily injury or intentionally causes harmful or offensive contact. *Hinojosa v. City of Terrell*, 834 F.2d 1223, 1231 (5th Cir. 1988). Wade admits that Walton never touched her, and never threatened to hit or touch her while they were in the car.[17] Wade was offended by Walton's comment, but was not so afraid of imminent offensive contact that she could not give a cogent answer to Walton's question.[18] Similarly,

---

[16] Another coworker was five feet away; no one has presented her testimony to the Court.

[17] Wade depo., at 668-69.

[18] Q. But you were on the way to Austin for a meeting?

A. Yes.

Q. At the Higher Education Coordinating Board?

A. Yes, ma'am.

Q. So, you said he rolled up the windows and locked the doors and said now that we are alone, tell me what sexual harassment is?

while Wade describes Walton as "quivering with anger" during the February meeting, he never suggested that he was going to hit her.

Wade correctly cites *Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1012 (S.D. Tex. 1991), for the proposition that a claim of assault may be based on "an offer to use force [and] an apparent ability and opportunity to carry out the threat immediately." Unlike the plaintiffs in *Vietnamese Fisherman*, however, Wade does not claim that Walton brandished a weapon or made any threatening gesture toward Wade besides pointing a finger her. Under the circumstances, this claim, like the others, must fail.

Conclusion

For these reasons, the Court will GRANT Defendants' motion for summary judgment (Dkt. #13) as to all of Plaintiff's claims. This grant of summary judgment renders MOOT Defendants' motion to dismiss Plaintiff's contract claim on the ground of sovereign immunity (Dkt. #4) and Defendants' motion to strike Plaintiff's claim for punitive damages (Dkt. #13).

A. Yes.

Q. Did you tell him?

A. Yes, I did.

Q. What did you tell him?

A. I told him it was actions, verbal or physical that were unwelcome, offensive and create a hostile environment. I told him I wasn't an expert on the issue.

It is so ORDERED. The Clerk shall enter this Order and provide at true copy to each party.

Signed this 6th day of September, 1996.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT
JUDGE

FILED
JUL 1 1998
OFFICE OF THE CLERK

No. 97-1906

In The
Supreme Court of the United States
October Term, 1997

MELONIE WADE,
Petitioner,

vs.

VICTORIA COLLEGE,
Respondent.

On Petition for a Writ of Ceritorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CHRISTOPHER A. KNEPP
CHRISTOPHER H. HAHN
Counsel of Record

VINSON & ELKINS, L.L.P.
One American Center, Ste. 2700
600 Congress Avenue
Austin, Texas 78701-3200
(512) 495-8400
(512) 495-8612 Facsimile

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

COUNTER-STATEMENT OF THE CASE 1

The Facts 1

REASONS THE WRIT SHOULD BE DENIED 5

I. The Issue of Employer Liability for Supervisor Retaliation Is Not Presented By This Case 6

II. The Issue of What Constitutes an Adverse Employment Action Is Not Presented By This Case 7

III. The Fifth Circuit Properly Determined That There Were No Issues of Material Fact on the Issue of Causation 10

CONCLUSION 11

TABLE OF AUTHORITIES

Burlington Industries, Inc. v. Ellerth, No. 97-569, 1998 WL 336326 (U.S. June 26, 1998) 7

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) 8

Cross v. Cleaver, No. 97-3441, 1998 WL 164414 (8th Cir., April 10, 1998) 6

Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993) 9

Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 336, 139 L.Ed.2d 260 (1997) 8

Oncale v. Sundowner Offshore Services, Inc., ___ U.S. ___, 118 S. Ct. 998, 140 L.Ed.2d 201 (1998) 10

Wyatt v. Cole, 504 U.S. 158, 112 S. Ct. 1827, 118 L.Ed.2d 504 (1992) 8

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERITIORARI

COUNTER-STATEMENT OF THE CASE

The court of appeals in this case affirmed summary judgment for the College because Petitioner Melonie Wade ("Wade") failed to produce sufficient evidence to create a genuine issue of material fact on her claim of retaliation under Title VII of the Civil Rights Act of 1964. The Fifth Circuit based its ruling on legal principles that are fully consistent with the precedent of this Court and other circuits. This case presents no issue that warrants review by this Court.

Pursuant to Rule 15.2 of the Rules of the Supreme Court of the United States, Respondent The Victoria College (the "College") identifies the following misstatements of fact in Wade's Petition for Writ of Certiorari (hereinafter "Petition"). The following misstatements bear on issues that properly would be before the Court if certiorari were granted.

The Facts

As she did below, Wade continues to assert as "fact" certain propositions that are not true and not supported by any evidence. Indeed, the District Court granted the College's motion for summary judgment in large part because "Wade bases her retaliation claim mostly on speculation, inadmissible hearsay, or unhelpful facts." (Pet. App. 18) For these reasons, the College offers the following accurate statement of facts:

In July of 1991, Tom Walton ("Walton") hired Wade as an assistant to help him with the "Tech Prep" program, a federally funded, statewide technical education program administered by the College. (Pet. App. 6-7) Walton was the College official responsible for the program, and he directly supervised Wade.

Wade alleged that, over the next seven-plus months, Walton made several offensive comments of a sexual nature. (Pet. App. 7-8) Wade never complained of these comments at the time they were made. Indeed, she did not indicate in any way that she found them offensive until months later, on February 25, 1992. (Pet. App. 8 & n.1)

On that day, Wade confronted Walton and, for the first time, complained that she found certain of his comments unwelcome. (Pet. App. 8 & n.1) Walton immediately apologized, informed Wade that he was not aware he had done anything wrong, and promised to refrain from making any offensive comments or actions in the future. (Pet. App. 8) Walton never engaged in any action that Wade considered to be sexual harassment after that date. (Pet. App. 8 & 15)

Shortly before Wade informed Walton that she found some of his comments offensive, Wade and Walton became embroiled in a dispute over who had ultimate authority over the Tech Prep program. In early February 1992, a state official at the Texas Higher Education Coordinating Board sent a memo to members of Tech Prep programs across the state that caused confusion about the distribution of authority between the community colleges and certain Tech Prep personnel, such as Wade. Wade interpreted the

memo to mean that she did not report to anyone at the College. Without conferring with Walton, Wade then created a board of directors for the local Tech Prep consortium of business and education. On February 25, 1992, Wade sent out a memorandum inviting persons to serve on the board of directors.

Walton found out about Wade's actions and, over the next two days, Wade and Walton had several arguments regarding various facets of the Tech Prep program. (Pet. App. 8) Walton complained that Wade created the board of directors without his input. (Pet. App. 8) Based on her interpretation of the memo from the Texas Higher Education Coordinating Board, Wade told Walton that she did not have to answer to him. Walton challenged Wade's claimed authority over Tech Prep. (Pet. App. 8)

Wade assumes that these arguments were retaliation for telling Walton that she found some of his comments offensive. However, the College submitted undisputed summary judgment evidence indicating that the Wade-Walton arguments actually centered around their dispute regarding authority over the Tech Prep program. (Pet. App. 2) There is no evidence to the contrary.

On February 28, 1992, Wade complained to Dr. Jimmy Goodson, the President of the College, that Walton made inappropriate sexual comments. (Pet. App. 9) In response to Wade's complaint, Dr. Goodson immediately removed Walton as Wade's supervisor and directed that Wade would thereafter report directly to Dr. Steve Thomas, the College's Dean of Instruction. (Pet. App. 9) In addition to taking away Walton's supervisory authority over Wade, Dr. Goodson directed Walton to avoid face-

to-face conversations with Wade. (Pet. App. 9) Walton and Wade were never again alone together and never had any direct dealings (other than limited telephone conversations while Wade was absent due to an extensive illness). (Pet. App. 9 & n.3)

In her Petition, as she did below, Wade asserts that Walton thereafter retaliated against her for complaining to Dr. Goodson. Wade alleged sporadic incidents over several months following her report to Dr. Goodson. However, Wade failed to support her allegations with any competent summary judgment evidence.

For example, Wade claims that after Walton was stripped of his supervisory authority over her, she was told "she would have to continue working with Walton." (Pet. 5) Wade's allegation is untrue and belied by her own admissions in the summary judgment record. The record evidence is undisputed that Walton and Wade never worked together again and that Walton never again had any supervisory authority over Wade.

Wade also asserts that Walton "kept Wade from getting information she was supposed to get regarding the [Tech Prep] program." (Pet. 14) Again, Wade produced no evidence in support of this allegation. In fact, Wade admitted that she merely "assumed" that Walton had done something wrong. (Pet. App. 19)

Perhaps most significantly, Wade complains that Walton caused a "boycott" of a Tech Prep committee meeting in November of 1992. (Pet. 6 & 14) This is the last incident alleged by Wade to be "retaliation" and the only incident that Wade alleges to have occurred at any time close to her January 1993 resignation. Again, however, Wade's allegation is untrue and

unsupported by any evidence. The College submitted undisputed evidence that Walton had nothing to do with the problems at the committee meeting (which neither Wade nor Walton attended). (Pet. App. 11) In fact, Wade admitted that she had no personal knowledge of the supposed "boycott" and failed to challenge the College's evidence regarding the meeting. (Pet. App. 19 & n.10)

Not only was Wade unable to set forth specific, competent evidence of retaliation in the nearly 11 months between her complaint of sexual harassment and her resignation, the undisputed summary judgment evidence demonstrates that the College was extremely supportive of Wade. Wade was never disciplined or reprimanded in any way during her tenure at the College. Rather, after she complained about Walton's alleged sexual harassment, Walton was removed from supervision of Wade and of the Tech Prep project, while Wade was promoted to the position of Tech Prep Coordinator and was given a raise. (Pet. App. 11)

In spite of the College's positive treatment of Wade, Wade did not attempt to resolve her problems from within her existing employment relationship. Even though Wade successfully resolved her concerns about sexual harassment by reporting them to Dr. Goodson, Wade never returned to Dr. Goodson to complain of any alleged retaliation. (Pet. App. 20) Rather, Wade simply resigned her employment, effective January 15, 1993. (Pet. App. 11)

REASONS THE WRIT SHOULD BE DENIED

In her Petition, Wade argues that this Court should adopt a new standard for employer liability in retaliation cases. Because

the new standards proposed by Wade are inapplicable under the facts of this case, and because she would not meet the standards she seeks to have established, this case prevents no issue that warrants this Court's review.

I.

The Issue of Employer Liability for Supervisor Retaliation Is Not Presented By This Case.

In her Petition, Wade makes several arguments in support of her claim that certiorari should be granted. Each of her theories depends upon a crucial factual predicate which is not present in this case—the alleged retaliator's supervision of the alleged victim. Wade first argues that the College "is responsible for retaliation against an employee for reporting sexual harassment committed by a supervisory employee who uses his supervisory status to effectuate the retaliation." (Pet. 7) Wade then asserts that the College "is responsible for the supervisory employee's retaliation" because it did nothing to stop it. (Pet. 11) The appropriate standard for employer liability for retaliatory acts of a plaintiff's supervisor is not at issue in this case because Walton was not Wade's supervisor.

The cases cited by Wade are inapposite. For example, Wade cites *Cross v. Cleaver*, No. 97-3441, 1998 WL 164414 (8th Cir., April 10, 1998) in support of her argument for strict liability. (Pet. 8) Key to the Eight Circuit's holding in *Cross* was the fact that the alleged retaliator "had direct authority over the [alleged victim]." *Cross*, 1998 WL 164414 at *14. Attempting to apply *Cross* to this

case, Wade summarily asserts that "Walton had direct authority over Wade." (Pet. 10) This is untrue and wholly unsupported by the record evidence.

As noted by both the district court and the court of appeals, it is undisputed that Dr. Goodson stripped Walton of his authority over Wade and prevented any significant contact between the two of them. Relying on the undisputed evidence offered by the College, the district court noted "Walton was not in a position of authority to alter the terms and conditions of her employment after February 28, 1992." (Pet. App. 19) Rather, Wade reported directly to Dr. Thomas, who gave her a promotion and a raise. (Pet. App. 2, 9, 11, 16, 19) Accordingly, Wade's proposed legal standards, whatever their merit, do not apply in this case.[1]

II.

The Issue of What Constitutes an Adverse Employment Action Is Not Presented By This Case.

In the district court and the court of appeals, Wade prosecuted her retaliation claim under a theory of constructive discharge.

---

[1] In her Petition, Wade also argues by analogy to sexual harassment cases involving harassment by the plaintiff's immediate supervisor. This Court recently clarified the standard for employer liability in cases with harassment by "a supervisor with immediate (or successively higher) authority over the employee." *Burlington Industries, Inc. v. Ellerth*, No. 97-569, 1998 WL 336326 at *15 (U.S. June 26, 1998). Unlike the situation in *Burlington Industries*, Walton did not have immediate or successively higher authority over Wade.

Because there was no evidence of intolerable working conditions imposed by Walton or the College, and no evidence of retaliatory motive, the district court and the Fifth Circuit rejected Wade's claim.[2]

In her Petition, Wade argues that the Fifth Circuit's standard for "adverse employment action" is too onerous and should be replaced by a standard that allows a retaliation claim to proceed under a hostile environment theory. (Pet. 11-13) Wade did not present this theory below and she cites no circuit court authority for this novel proposition.[3] In any event, this Court need not decide which standard applies. Under either standard, Wade cannot prevail.

---

[2] In discussing her constructive discharge claim, Wade claims that the issue "cannot be resolved on summary judgment" because issues of reasonableness are involved. (Pet. 15). This assertion is directly contrary to established precedent of this Court. Summary judgment is appropriate where the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Under the principles set forth in *Celotex* and related cases, the strength of factual allegations even as subjective as a party's intent can be tested at the summary judgment stage. *Wyatt v. Cole*, 504 U.S. 158, 171, 112 S. Ct. 1827, 1835, 118 L.Ed.2d 504 (1992) (Kennedy, J., concurring).

[3] In fact, this Court denied certiorari in a case where the issue was squarely presented. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 336, 139 L.Ed.2d 260 (1997).

This Court has indicated that a plaintiff must come forth with evidence of "severe and pervasive" conduct to support a hostile work environment claim. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L.Ed.2d 295 (1993). Circumstances to be considered in determining whether conduct is sufficiently severe and pervasive to create a hostile environment include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Id.*

As noted above, Wade complains of sporadic "retaliatory" acts over an 11-month period. The conduct complained of is not frequent, severe, threatening or humiliating. More importantly, most of the alleged retaliatory acts have no evidentiary basis; rather, they are based on "speculation, inadmissible hearsay, or unhelpful facts." (Pet. App. 18-19) Discounting Wade's assumptions and speculation and considering the competent evidence of the College's positive treatment of Wade throughout her employment, no reasonable jury could conclude that Wade was subjected to a hostile work environment. Accordingly, Wade could not prevail under a hostile work environment theory of "adverse employment action."

Additionally, even had Wade submitted sufficient evidence to establish the requisite severity and pervasiveness to meet the standard for a hostile work environment, Wade would still be required to come forward with evidence of causation. In the

context of a sexual harassment claim, this Court recently reaffirmed that

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discriminat[ion] . . . because of . . . sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.

Oncale v. Sundowner Offshore Services, Inc., ___ U.S. ___, 118 S. Ct. 998, 1002, 140 L.Ed.2d 201 (1998). Even if a retaliation claim could be prosecuted under a hostile environment theory, the plaintiff would have to produce evidence that the harassing conduct was directed at the plaintiff because of the plaintiff's protected activity. Here, Wade failed to produce evidence to raise a genuine issue of material fact regarding retaliatory intent. (Pet. App. 4) Because Wade failed to produce evidence sufficient to withstand summary judgment even under the standard she seeks to employ, the Petition presents no issue for this Court's review.

III.

The Fifth Circuit Properly Determined That There Were No Issues of Material Fact on the Issue of Causation.

Wade's final appeal is that the Fifth Circuit erred in concluding that she failed to raise an issue of material fact on the issue of causation. (Pet. 16) Wade concedes that the College submitted evidence of legitimate, nondiscriminatory reasons for its

actions. (Pet. 16) Wade neglects to mention that these reasons were never rebutted. Instead, Wade restates the factual assertions for which there is no competent summary judgment evidence. Because Wade failed to present evidence of a causal connection, and because Wade failed to rebut the College's evidence of legitimate, nondiscriminatory reasons, summary judgment for the College was proper.

CONCLUSION

For the foregoing reasons, Wade's petition for writ of certiorari should be denied.

Respectfully submitted,

CHRISTOPHER A. KNEPP
CHRISTOPHER H. HAHN
Counsel of Record

VINSON & ELKINS, L.L.P.
One American Center, Ste. 2700
600 Congress Avenue
Austin, Texas 78701-3200
(512) 495-8400
(512) 495-8612 Facsimile

Attorneys for Respondent